



March 5, 2002

Mr. Wayne K. Olson
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OR2002-1075

Dear Mr. Olson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159371.

The Haltom City Police Department (the “department”), which you represent, received a request for “information related to internal inquiries made regarding the conduct of Officer Dennis Ochs.” You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Included among the documents you seek to withhold is an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer’s accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. The Seventy-seventh Legislature amended section 550.065(c)(4) to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 1544, § 5 (to be codified at Transp. Code § 550.065(c)(4)). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has not provided the department with two of the three pieces of information. Thus, the department must withhold the accident report under section 550.065(b).

You claim that section 552.101 of the Government Code excepts a portion of the submitted information from public disclosure. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

This section encompasses information protected by other statutes. Section 1703.306 of the Occupations Code provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. We find that certain information in the submitted records was obtained through polygraph examinations. It does not appear that any of the exceptions in section 1703.306 apply in this case. *See* Open Records Decision 565 (1990)(construing predecessor statute). Accordingly, the information we have marked is confidential pursuant to section 1703.306 of the Occupations Code and is therefore excepted from disclosure under section 552.101 of the Government Code.

You further claim that some of the information contained in the submitted files is excepted from disclosure under section 552.101 in conjunction with common-law privacy, and under section 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is protected by the common-law right of privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

The submitted information contains victim and witness identities and statements, as well as information relating to complaints against the officer that were not sustained. Based upon our review of the documents at issue, we do not find that the types of information you seek to withhold are protected by a right of privacy. Open Records Decision Nos. 484 (1987) (public interest in knowing how police departments resolve complaints against police officer ordinarily outweighs the officer's privacy interest), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 329 (1982) (reasons for an employee's resignation are not ordinarily excepted by constitutional or common-law privacy). Thus, victim and witness identities and statements, and information relating to complaints against the officer that were not sustained may not be withheld from disclosure under section 552.101 or 552.102.

You next argue that section 552.108 excepts portions of the submitted information from public disclosure. Section 552.108, the "law enforcement exception," provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication [.]

Gov't Code § 552.108(a)(1), (b)(1), (b)(2). A governmental body that raises section 552.108 must reasonably explain, if the responsive information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision Nos. 562 at 10 (1990), 434 at 2-3 (1986).

You argue that the information contained in Exhibit C, Tab 3, may be excepted under section 552.108(a)(1) because it contains information dealing with detection and investigation of a crime. You represent that the matter has been referred to the district attorney's office for prosecution. However, you have not explained how the release of the information at issue would interfere in some way with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1). Thus, you may not withhold the document in Exhibit C, Tab 3, from disclosure because you have not met your burden of showing the applicability of section 552.108(a)(1).

We next observe that information about complaints against police officers generally may not be withheld under section 552.108. For example, the names of complainants, the names of the officers who are the subjects of complaints, an officer's written response to a complaint, and the final disposition of a complaint generally are not excepted from disclosure by section 552.108. Open Records Decision Nos. 350 at 3 (1982), 342 at 2 (1982), 329 at 2 (1982). In certain cases, the identities of witnesses, informants, and persons interviewed in the course of a police internal investigation may be withheld under section 552.108 if the police department determines that disclosure either might subject these individuals to possible intimidation or harassment or might harm the prospects of future cooperation. Open Records Decision Nos. 329 at 2 (1982), 313 at 2-3 (1982), 297 at 2 (1981), 252 at 4 (1980). However, section 552.108 is inapplicable where a complaint against a law enforcement officer does not result in a criminal investigation or prosecution. *Morales v. Ellen*, 840 S.W.2d 519, 525-526 (Tex. App.—El Paso 1992, writ denied) (construing statutory predecessor); Open Records Decision No. 350 (1982) (stating that statutory predecessor was not applicable to internal affairs investigation file when no criminal charge against police officer results from investigation).

Additionally, this office has concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding that section 552.108 excepts detailed guidelines regarding a police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that section 552.108 excepts sketch showing security measures for execution). However, commonly known policies and techniques may not be withheld under section 552.108. *See,*

e.g., Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention).

In this case, the submitted information relates to internal affairs investigations of violations of departmental policy, rather than to a criminal investigation. Investigations into non-criminal matters are not excepted from disclosure by section 552.108 of the Government Code. *Morales v. Ellen*, 840 S.W.2d at 526 (predecessor statute to section 552.108 not applicable where no criminal investigation resulted). Therefore, section 552.108 does not apply to the investigative files. Additionally, we find that you have not adequately explained how and why release of the departmental policies and techniques would interfere with law enforcement and crime prevention. Therefore, the information at issue may not be withheld under section 552.108.

You claim that section 552.111 of the Government Code excepts a portion of the information in Tab 2 from public disclosure. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. After careful review of the document at issue, we find that a portion of the information contained therein consists of advice, recommendations, opinions, and other material reflecting the policymaking processes of the department. We have marked the information that the department may withhold under section 552.111.

We note that certain information which you have submitted to this office for review is excepted from disclosure under section 552.130. Section 552.130 provides in relevant part:

- (a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

The department must withhold the Texas driver's license number, vehicle identification numbers, and license plate numbers under section 552.130.

The submitted information also contains a social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, we have marked the information that the department may withhold under section 552.111, and under section 552.101 in conjunction with 1703.306 of the Occupations Code. The accident report must be withheld from disclosure under section 550.065(b). The department must withhold the Texas driver's license number, vehicle identification numbers, and license plate numbers under section 552.130. Prior to releasing any social security number information, the department should ensure that no such information was obtained or is maintained pursuant to any provision of law, enacted on or after October 1, 1990. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 159371

Enc. Submitted documents

c: Mr. Gregory A. Slate
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(w/o enclosures)